IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 466 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHACHU DEVJI SOLANKI

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioners

MR KC SHAH, APP for Respondent No. 1

MR NITIN AMIN for the complainant.

CORAM : MR.JUSTICE C.K.BUCH

and

MR.JUSTICE H.H.MEHTA

Date of decision: 22/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE C.K.BUCH)

1. The appellants original accused of Sessions Case No. 42 of 1989 tried and decided by the Ld. Additional Sessions Judge, Kutch at Bhuj, have filed this appeal u/S. 374 of the Code of Criminal Procedure. The accused no.1 held guilty for the offence punishable u/S. 302, 34 of the Indian Penal Code (for short 'the IPC') and is ordered to undergo rigorous imprisonment (R.I.) for life and to pay a fine of Rs.500/- and in default to undergo simple imprisonment for one month. The accused no. 1 is also held guilty for the offence punishable u/S. 307 of the IPC and is directed to undergo R.I. for 10 years and also to pay a fine of Rs.1,000/- and in default to undergo S.I. for 3 months. Accused nos. 2 to 4 are also held guilty of the offence punisahble u/S. 326 read with sec. 34 of the IPC and are directed to undergo R.I. for 3 years and to pay a fine of Rs.500/- each and in default to undergo S.I. for one month. However, the accused are directed to undergo the sentence concurrently.

2. The appellants nos. 1 to 4 are original accused and for the sake of convenience we have referred all the appellants as the accused indicating the numbers in the judgment. The accused no. 1 is the son of accused nos. 2 and 3 Devji Rasang Solanki and Badhiben Devji and real brother of accused no. 4 Shantaben Devji. Thus all the 4 accused are members of one family headed by accused no. 2 - Devji Rasang Solanki. Deceased Pravin Arjan was brother-in-law of the accused no. 1 - Bachu Devji Solanki and the injured victim Narsinh Kachraji is maternal uncle of deceased Pravin, ofcourse not real maternal uncle but distant cousin of mother of deceased Pravin.

3.(i) According to the prosecution wife of accused no. 1 - Lilaben was ill-treated. She had a son and a daughter out of wedlock with the accused no.1 and that at about one and half months prior to the date of incidient Lilaben, real sister of the deceased Pravin, had returned to her parental house with the female child because of ill-treatment. However, the son Lala was in the custody of the accused no. 1 and his family.

On the date of incident i.e. 28/2/1989 deceased Pravin Arjan, brother-in-law of accused no. 1, had gone to the house of the accused with a view to bring Lala with him as he was to be taken for some religious ceremony, popularly known as "Manta" with his maternal uncle Narsinh Kachraji. On seeing Pravin Arjan, accused

no. 3 Badhiben asked him as to why he had come and immediately thereafter accused nos. 1 and 2 armed with sword and Dhariya respectively rushed towards deceased and assaulted. Narsinh Kachraji who had accompanied Pravin tried to intervene had resisted and sustained a head injury i.e. a sword blow by accused no.1. It is the case that during the assault accused no. 2 gave a Dhariya blow to the deceased Pravin, but it landed on the roof of Dhaliya and thereafter accused no. 2 gave another blow with Dhariya to deceased Pravin and as a result of which Pravin had fallen down. According to prosecution, at that point of time the accused nos. 3 and 4 who were sharing the intention with accused nos. 1 and 2 caught hold of the deceased Pravin Arjan, and accused no. 1 gave sword blows to Pravin causing serious injuries.

(ii) After receipt of the sword blow on the head from accused no.1 Narsinh Kachraji came out of the house of the accused persons and started running for help. Number of persons including prosecution witnesses, namely Pravinsinh Keshubha and Rajendra Luvana Bhagvanbhai, Ramanbhai and Shamjibhai met him on the way and he immediately informed them about the incident and told that Pravin was lying in the house of the accused in an injured condition.

(iii) Rajendra Luhana and Pravinsinh Keshubha and others, on the information, as they were very near, entered into the house of the accused persons and at that time all the four accused were there and they were trying to run away from the back door of the house and ultimately they left the house from the back door. These persons arranged for a hand cart and took the injured Pravin to the hospital where he was, on examination, declared dead.

(iv) In the meanwhile the injured Narsinh Kachraji reached to the police station and informed the police. He lodged formal complaint and on the basis of the said complaint police started investigation and charge-sheeted all the four accused for the offence punishable u/Ss. 302, 307, 326 read with sec. 34 of the IPC. At the end of the trial the Ld. Addl. Sessions Judge, Kutch at Bhuj by his judgment and order dated 25/4/1990 held the accused guilty for the aforesaid offences and sentenced them as referred to hereinabove. This appeal is filed challenging the said conviction and sentence.

4. Ld. Senior Counsel Mr. A.D. Shah has taken us through the evidence of P.W. 1 Dr. Chandrakant

Mavjibhai, exh.9 and the relevant portion of P.M. note exh. 10. On referring to some part of the deposition of P.W. 6 Narsinh Kachraji exh.22 Mr. shah has submitted that the version of the complainant Narsinh Kachraji does not get corroboration from the medical evidence. He has also tried to point out that injured Narsinh Kachraji himself is not even consistent qua the injuries sustained by him. In the complaint i.e. FIR exh. 36 he has said that he was given a sword blow by accused no. 1 but the version of P.W. 3 Pravinsinh Keshubha is that this very Narsinh Kachraji has told him that he was given Dhariya blow on the head by accused no.2 Devji. According to Mr. Shah this material conflict has not been appreciated properly by the Ld. trial Judge. According to Mr. Shah the case of the prosecution rests with only one witness i.e. Narsinh Kachraji. Even if the Court feels that his presence at the place of incident is genuinely proved, then also uncorroborated testimony of this witness ought not to have been accepted as a Gospel truth. The learned trial Judge has not tried to seek any corroboration and has ignored the conflicting part of the evidence available on record. Eye witness who is not corroborated by medical evidence normally should not be believed and as a rule of prudence Court must seek reasonable corroboration in such a eventuality. Mr. Shah has argued that Pravinsinh Keshubha and Rajendra Bhagvanji has tried to help the prosecution by falsely implicating accused nos. 3 and 4, female members of the family of accused nos. 1 and 2 as if they have seen some overt act of these female accused. Certain suggestions made to P.W.3 Pravinsinh Keshubha and complainant Narsinh Kachraji were also brought to the notice of this Court and it has been submitted that these two witnesses, namely Pravinsinh Keshubha P.W. 3 and Rajendra Bhagvanbhai P.W. 4 ought to have been held as persons interested in the prosecution and their evidence cannot be relied upon as reliable piece of evidence which can corroborate the version of complainant Narsinh Kachraji.

5. The other main submission of Mr. Shah is that prosecution has tried to suppress genesis of the crime and when Narsinh Kachraji is the only witness, he could have unfolded the true story before the Court. The initiation of the exchange of words between deceased Pravin and accused no. 3 is prima-facie found improbable and on bare exchange of words uttered before the Court during deposition, would not have given cause to accused nos. 1 and 2 to assault deceased Pravin with deadly weapons like sword and Dhariya. There was ample probability of other conversation resulting into scuffle. It is also probable that deceased Pravin might have tried

to snatch the minor child aged about one year. The condition of the clothes of the accused recovered, during the course of investigation under a Panchnama exh. 30, gives clear intention of some scuffle, otherwise these clothes would not have been stained with blood on the back portion and these clothes would not have found damaged or torn off. A witness who suppresses the genesis of the crime or who fails in unfolding the correct story before the Court should be termed as unrreliable witness and it would not be safe to accept such version according to the accepted principles of our criminal jurisprudence of this country. Undisputedly, according to Mr. Shah, P.W. 3 and 4 Pravinsinh Keshubha and Rajendra respectively are not eye witness to the incident, the scope of their arrival at the house of accused persons at any later point of time i.e. after leaving the house by the accused person is more probable. So in view of this the Ld. trial Judge ought not to have held the accused nos. 3 and 4 guilty of any offence. He has also tried to point out that there is evidence to the effect that P.W. 3 Pravinsinh has some experience of Court and its proceedings and he might have helped the prosecution in moulding the story. In a nutshell the act of putting burden of the substantial part by prosecution goes to the root of the result and, therefore, the accused should be acquitted. During the course of enlargement of the argument Mr. Shah has tried to submit that sword is a weapon which is normally used to inflict a through blow with force or the same is whrilled and normally it is not used to inflict a stab injury. Nature of injury on the body of deceased Pravin is not prima-facie look like a sword blow and the fatal injury found on the body is a stab wound on the chest. Though, the doctor who has performed post mortem, narrated that the body was found with 4 external injuries. The column 17 of the P.M. note says about only 3 and all the 3 injuries narrated in column 17 of P.M. note exh. 10 are of the type, or any of it could not have been caused with blow of Dhariya. This is a case wherein Dhariya must not have been used by the accused no.2. Even then, during the course of investigation the police has recovered a blood standed Dhariya. This fact is suggestive of some exaggeration made by the prosecution witnesses and the investigating agency with a view to implicate all the family members in the crime. Mr. Shah by pointing out some improvements made by the prosecution witnesses in the contradictions found in their version, has ultimately submitted that the appeal of the appellant accused persons should be allowed and all of them should be acquitted from the charges levelled against them.

6. It is alternatively argued by Mr. Shah that so far as the injuries sustained by Narsinh Kachraji is concerned and if the Court holds that crime qua accused no. 1 is substantially proved beyond doubt, even then the conviction u/S. 307 of the IPC is bad. Considering the visit of the house of the accused by Narsinh Kachraji, without prior intimation and the scope of sudden scuffle, accused no. 1 could not have been attributed with intention of killing P.W. 6 Narsinh Kachraji. Though the injury is on the vital part i.e. head, the same cannot be said to be grievous hurt. It is simple in nature. Accused no. 1 has not tried to inflict second blow to Narsinh Kachraji. Other 3 injuries narrated by Narsinh Kachraji in his examination-in-chief were not noticed by the doctor who examined Narsinh Kachraji. Thus, the learned trial Judge ought not to have convicted accused no. 1 for the offence punishable u/S. 307 of the IPC. According to Mr. Shah if it is held that any offence qua Narsinh Kachraji has been committed by accused no.1, the same cannot be said to be more serious offence than one under section than u/S. 324 of the IPC.

7. After hearing the detailed arguments of Mr. A.D. Shah, Ld. Senior Counsel, Mr. K.C. Shah, Ld. APP for the State made a direct request to the Ld. counsel appearing for the appellants to assist the Court on the point of nature of alleged offence committed by the accused nos. 1 and 2, if the Court believes that the incident, substantially in the manner in which narrated by the prosecution, has occurred on the date of incident. In response thereof, without prejudice to his earlier contentions, Mr. A.D. Shah has submitted that in the light of the decision in the case of Surinder Kumar v. Union Territory, Chandigarh reported in AIR 1989 S.C. 1094 it should be held that the accused is not guilty of the offence punishable u/S. 302 of the IPC, but responsible for lesser offence punishable u/S. 304 Part-I read with sec. 34 or sec. 114 of the IPC. He has taken us through the relevant portion of the cited judgment wherein six injuries were inflicted on the body, one of them on chest of the deceased, which was found fatal. We shall try to deal with this aspect in the later part of our judgment.

8. Ld. APP Mr. K.C. Shah has submitted that the judgment of the learned trial Judge is absolutely in accordance with law and has rightly appreciated the facts available on record. According to Ld. APP complainant Narsinh Kachraji is an injured eye witness whose presence at the place of incident, being a relative of deceased

Pravin Arjan and Lilaben, wife of accused no.1 was natural. The story of the prosecution is consistent qua the cause of the visit of deceased Pravin and Narsinh Kachraji at the house of accused persons. By pointing out the birth date of the son of accused no. 1 and Lilaben available from certificate on record, he submitted that it is very likely that because of the completion of one year of birth of minor son Lala, Pravin Arjan might have visited house of the accused with a request to permit them to carry Lala at the place of "Manta". Age of Pravin Arjan, according to Mr. Shah, is relevant. Comparatively young in age, he might have taken assistance of his maternal uncle native of village Bhachav itself. There was no reason for P.W. 6 Narsinh to say no to Pravin when he was to go to his sister's place for a reasonable cause. Injury on the head of Narsinh Kachraji, when he was coming out of the house of the accused seen by two prosecution witnesses examined by the prosecution, namely Pravinsinh Keshubha and Rajendra Bhagvanji and the act of lodging FIR in couple of minutes in the police station naming the accused persons are relevant aspects of the case of the prosecution which could not have been ignored by the trial Court. The stab injuries caused to the deceased Pravin Arjan are inflicted after he fell down. So such injuries could not have been inflicted by sword as the same is pierced in the body. Two unarmed persons were assaulted inside the house by accused nos. 1 and 2. Undisputedly the blood of the deceased was found on the earth in the open space i.e. Falia, - land abutting the house and within the compound of accused persons. Accused no. 1 had no reason to give sword blows stabing it into the body of the deceased when he had already fallen down. The nature of injuries inflicted and number of blows found are sufficient to gather the intention of the assailant accused. There is no scope even to think of a case of private defence. Weapons recovered at the instance of accused and the clothes of the accused were found blood stained with human blood and the clothes of accused nos. 1 and 2 were found stained with the blood of the group which was found on the clothes of deceased during forensic science laboratory examination. Undisputedly the blood group of deceased was of group 'AB' and the blood of this very group was found on the clothes of accused nos. 1 and 2. How and why the back portion of the shirt of the accused was found stained with such blood is not a matter required to be explained by the prosecution. It may be accidiental. Looking to the sketch of the place of incident drawn by the Revenue Circle Inspector at exh. 13, Mr. Shah, Ld. APP has submitted that undisputedly deceased Pravin Arjan and

injured Narsinh Kachraji had entered into from the gate of Falia and a pair of sleeper was found in the open part abutting to a roof top (Dhaliya) used for keeping the cattle. This indicates that after leaving the sleepers outside the house, Pravin must have tried to talk to accused Badhiben so that he can conveniently take minor Lala with him. Mr. Shah, Ld. APP has submitted that even for the sake of argument it is expected that some hot exchange of words might have taken place, non-disclosure of such hot exchange of words by Narsinh Kachraji in his complaint cannot be said to be non-disclosure of genesis of crime. No material improvements is made by any of the prosecution witnesses and the version of Narsinh Kachraji is amply corroborated by surrounding circumstances and the version of P.W. 3 Pravinsinh Keshubha and P.W. 4 Rajendra Bhagvanji. The learned trial Judge, according to Mr. Shah, has considered all relevant aspects of the matter. FIR naming all the accused persons in couple of minutes discloses the basic story of the case of the prosecution. The version of the complainant Narsinh Kachraji before the Court is consistent to the FIR. This FIR can be used for the purpose of corroboration and, therefore, he has submitted that this is not a case of uncorroborated testimony of a sole or only of interested witnesses.

9. Mr. Shah also pointed out that there is no direct conflict between oral version of the complainant and the medical evidence. Some error if committed by PW 3 Pravinsinh Keshubha qua the weapon by which complainant sustained head injury and the accused responsible for the injury. But the same would not go to the merit as complainant himself has remained consistent. He is an injured eye witness and there are no material contradictions in his version or in the deposition of other important witness i.e. Rajendra Bhagvanji. Therefore, it would not be proper to hold that the trial Court has committed error in holding accused no. 1 guilty of the offence punishable u/S. 307 of the IPC. In response to the query raised by the Court, Mr. Shah has submitted that the nature of evidence available on record, comparatively, can be said to be a weak piece of evidence so far as accused nos. 3 and 4 are concerned. Their presence at the place of incident is natural and the likelihood of their false involvement in the crime is highly probable. The conduct of both these accused of leaving the house in couple of minutes with accused nos. 1 and 2 also cannot be ignored. But as the clothes of these two lady accused were not found stained with the blood of the deceased, the trial Court could have taken the another view. As per Mr. Shah, looking to the

genesis of the crime i.e. wish of taking of Lala by deceased Pravin Arjan was such a social eventuality, that these two female members of the family might have involved themselves in the crime. However, this is a case wherein two possibilities exist. According to Mr. Shah, Ld. APP the conviction qua accused nos. 1 and 2 is absolutely legal and appeal of atleast two appellants deserves dismissal. While replying the arguments for altering the conviction u/S. 307 into section 324 of the IPC qua accused no. 1 for causing injuries to Narsinh Kachraji is concerned Mr. Shah has submitted that head being vital part of the body, the Court should not interfere with the findings.

10. To appreciate the contentions raised by Mr. A.D. Shah, Ld. Counsel for the appellants and Ld. APP Mr. K.C. Shah, we have gone through the entire oral as well as documentary evidence and the authorities cited before us. There is no dispute that the death of Pravin Arjan is a homicidal death and he succumbed to the injuries inflicted on his chest. Whether accused nos. 1 and 2 both have tried to inflict blows on the deceased and whether both have caused injuries on the body of the person deceased is the question to be decided. For this oral version of Narsinh Kachraji, P.M. note of deceased Pravin and the deposition of Dr. Chandrakant Mavjibhai, exh. 9 are important pieces of evidence. Recovery of blood stained Dhariya from accused no. 1 and the clothes of accused no. 1 being found with the stains of blood of the group of the deceased are other two circumstances which can be taken into consideration. The conduct of both the accused immediately after the incidient noticed by P.W. 3 and 4 is a circumstance which can be used against both the accused. Custody of Lala at the relevant point of time with accused no. 1 and his family and the fact that the deceased Pravin had gone to the house of the accused to fetch Lala as he was to complete one year of his birth and the existence of matrimonial disputes between the accused no. 1 and the sister of deceased Pravin are three other relevant aspects which needs consideration.

11. We are not inclined to accept the say of Mr. A.D. Shah that the ratio of the judgment in the case of Mool Chand v. Jagdish Singh Bedi reported in 1992 Criminal Law Journal p. 1539 can be applied to the facts of this case. In the case before the Apex Court, it has been held that the independent eye witness was highly artificial and his version did not fit with human probabilities. It was also found that the genesis of incident was shrouded in mystery and it was also held

that this highly artificial version and the genesis shrouded in mystery was sufficient to give rise to doubt. Even for the sake of argument it is expected that Narsinh Kachraji has not narrated the exchange of words resulting into some scuffle or provocation in the FIR, but the same cannot be equated with non-disclosure of the genesis of the crime. He had rushed to the police station in couple of minutes in an injured condition. His head was bleeding. If he narrates the cause of injury inflicted on him and on deceased Pravin Arjan, disclosing the cause of their visit at the house of the accused can be said to be sufficient. It is likely that on asking he might have tried to tell the police that their visit at the house of the accused was innocent and with a particular view or purpose and the exchange of words started with particular sentence had ultimately resulted into a serious crime. It is rightly argued by Mr. Shah, learned APP that blood stain found on the back side of the shirt is not a fact which needs to be explained by the prosecution side. It may be accidental also. Condition of the clothes of the accused suggests some quarrel but they are recovered after some hours. We agree that it is not the case of the prosecution that the condition of the clothes were changed by the accused themselves. But when the occasions had arisen before the Apex Court or High Courts where the injuries found on the body of the accused came for appreciation as to whether such injuries could have been said to be self inflicted injuries or injuries caused at a friendly hand. In most of those cases Courts have considered that aspect in light of the other surrounding circumstances. So it is difficult to accept the arguments of Mr. A.D. Shah that the condition of the clothes recovered from the accused must be the result of the so called scuffle and there was no scope to make such changes in their own clothes by the accused. It is experienced in many cases by the Courts that the accused on occasion, are causing injuries on their own body or gets injury caused at friendly hand. So the torn condition of the clothes narrated in Panchnama Exh.30 would not go to the extent of destroying the basic story of the prosecution. Therefore, we are not inclined to accept the submission that the incident must not have happened in the manner alleged by the prosecution or the true and correct account of what transpired in the circumstances under which the deceased and the injured witness sustained injuries has not been clearly given by prosecution. We agree that there are some improvements and contradictions in the case of prosecution, but none of these contradictions or improvements can be termed as infirmity in the case of prosecution touching the merit of basic version. Birth date of Lala is available on

record. Cause to visit the house of the accused persons by Pravin is substantially established. Undisputedly Narsinh Kachraji is a distant cousin of the mother of Pravin and in capacity of maternal uncle he had accompanied Pravin at the house of the accused persons. Meeting of Pravin and Nrasinh at a particular place and circumstances under which Narsinh Kachraji was present near the shop of Pravin is also found very probable. There is no scope to suspect against the story qua meeting of deceased Pravin and Narsinh Kachraji. An attempt is made to bring the version of Narsinh Kachraji as to use of Dhariya by accused no. 2 under a cloud of doubt during the course of argument by Mr. Shah. As per witness first blow had landed on one Dhaliya. The complainant is consistent qua this first blow. It is stated by Narsinh Kachraji that one blow of Dhariya had landed on abdomen of the deceased. Doctor who has performed post mortem and described 4 external injuries found by him at the time of post mortem. These injuries are as under :-

(1) Stab wound 1.1/2 cm x 1 cm (incised) x ? deep chest.

(2) Stab wound 1.1/2 cm x 1 cm x ? deep in inidclavicular line 4 cm below it hipple, bleeding.

(3) Stab wound 1.1/2 cm x 1 cm x ? deep on chest below and laterally in post axilary line bleeding.

(4) Sternum (body) pierced through and through.

It is mainly argued that injury no. 4 could not have been inflicted by Dhariya.Undisputedly injury nos. 1, 2 and 3 are stab wounds and it is rightly submitted that these could not have been inflicted by Dhariya. There was no external injury found on the body of the deceased qua injury no.4. It is argued that there should not be any reason for this Court in holding that injury no. 4 could not have been inflicted by Dhariya. The injury no. 4 has been shown in column no. 18 of the P.M. note and the same is described as sternum pierced through and through. If we consider the basic form of the P.M. note there was no reason for the doctor to mention injury no. 4 in column no.18. Therefore, it seems that though he has mentioned injury no.4 in column no. 18, during his

chief examination he has narrated injury no.4 as external injury found by him on the body of the deceased. It was a visible injury. Eye witness Narsinh Kachraji has said that one blow of Dhariya had landed on Pravin. He has not narrated part of the body in his examination-in-chief. Shape of Dhariya is relevant to appreciate the case of the prosecution qua the nature of injury no.4 found on the body of the deceased and the act of accused no.2. We agree that doctor has categorically admitted in his deposition that none of the injury found on the body of the deceased could have been inflicted by Dhariya. This direct conflict between the oral version of eye witness and the deposition of doctor shall have to be appreciated. Undisputedly Dhariya recovered during the course of investigation by the police was found with human blood and of the group of the deceased. Clothes of the accused no. 2 are also found with the very group of blood. In cases where the oral version of the eye witness is not found very consistent with the medical evidence, the Courts have taken different views. We agree that in most of the cases this Court and the Apex Court have tried to test the oral version of eye witnesses on the basis of the medical evidence. However, it is also an accepted principle that opinion evidence would not by itself nullify the evidence of eye witness. The Court also has to consider other relevant aspects. If the clothes of accused no. 2 would not have been found stained with blood of the group of the deceased and the Dhariya recovered also would not have been found with the blood of the group of the deceased, we would not have thought it fit to consider this principle qua the facts of this case. In the case of Prem v. Devla reported in AIR 1997 S.C. 715 wherein the Apex Court has found that there is a conflict in oral evidence and medical evidence qua use of Rapi, where the Apex Court has held that the opinion evidence should not have a nullifying effect of the evidence of the eye witness. Ratio of the above judgment is applicable to the present case.

12. As stated hereinabove, Dr. Chandrakant Acharya has described injury no.4 as an external injury in his deposition exh.9. In the cross-examination it was not suggested to this doctor that injury no. 4 was not visible or there was no visible external injury qua injury no.4 described by him. It is also not on record that injury no. 4 described by the doctor and shown in column no. 18 of P.M. note was corresponding to any of other three injuries stated by him. So it can be reasonably said that in the opinion evidence element of vagueness has emerged and, therefore, we can give weightage to the occular evidence of an eye witness. The

Apex Court has considered this aspect in the case of Ramdev v/s. State of U.P. reported in 1995 S.C.C. (Criminal) p. 420. Of-course, the facts of that case were different but the ratio laid down therein can help this Court in appreciating the set of facts of this case. The above totality does not leave a room for any major inconsistency between the occular evidence and medical evidence and it is always said by the Apex Court that when there is minor inconsistency between the medical evidence and occular evidence, the oral evidence should not be rejected. Anvar v. State of Haryana reported in 1997 (9) S.C.C. p.766 is one of such case wherein this very principle is considered. Description of Dhariya in Panchnama exh. 30 shows that it had a curved tip. Landing of the tip on the sternum bone can cause the injury which is described as injury no.4 by the doctor who has performed post mortem. Mr. Shah has tried to argue that injury no. 1 is visible injury and injury no. 4 must be the result of injury no.1. Injury no.4 is a hole through and through in the sternum bone and injury no. 1 must be the external injury seen by the doctor. Of-course the doctor himself has not stated that injury no. 4 is the internal injury qua injury no.1. No such suggestion was even made to the doctor during the course of cross-examination. Hence according to us the element of vagueness remains and the resultant effect is that it may be a minor inconsistency and not a material conflict. Evidence of eye witness on this ground should not be viewed with doubt. So the argument that accused no. 2 was falsely implicated in the offence though he had not given any blow to the deceased is not sustainable.

13. We agree that the external injuries narrated in the complaint by the witness Narsinh Kachraji are not reflected in the medical certificate, but as he was conscious, his injuries narrated to the doctor only might have been examined ignoring the so called simple injuries narrated by him in the FIR. So this discrepancy cannot be said to be material, and it has to be ignored.

14. In the FIR accused no. 2 is shown as one of the assailants with accused no.1. This consistency also cannot be ignored. Conduct of the accused no. 2 and accused no. 1 of running away from the back portion of the house is also relevant vis-a-vis the other above referred circumstances i.e. human blood found on the clothes, etc.

15. So far as case against accused no. 1 is concerned there is direct evidence of injured witness Narsinh Kachraji. According to us this witness has not

suppressed the genesis of the crime. Failure on the part of this witness, in stating certain words of hot exchanges or explaining the situation which might have provoked the otherside to be violent, would not go to the root of the merit of the case, because the grains are seperable from chaf. We cannot ignore that he is an injured eye witness and his version that he was assaulted in the house of the accused and Pravin Arjan is lying there is consistent. His conduct of rushing to the police station immediately is also reasonable and reliable. Though it is alleged that Pravinsinh Keshubha is the creator of the story, the fact remains that this Pravinsinh Keshubha had taken the injured Pravin to the hospital in a hand-cart. Father of the injured who had also rushed to the hospital in couple of minutes shows the presence of Pravinsinh Keshubha in the hospital. So the presence of Pravinsinh Keshubha in the hospital is very well established. Hence there was no scope for any prosecution witness including Pravinsinh Keshubha to tempt the complainant for exaggeration in the story. The conflict as to the blow received by him between his deposition and the version of Pravinsinh Keshubha is a discrepancy. But the same should not be given much weightage because complainant himself is consistent in his say and there is no material contradiction between the FIR and his version that a sword blow was given to him by the accused no.1. Witnesses Rajendra and Pravinsinh Keshubha were together when they saw injured Narsinh Kachraji for the first time near the house of the accused. This Rajendra was not asked question in his cross-examination as to whether Narsinh kachraji had stated about his injury or whether he was accusing accused no. 2 for the injury sustained by him. The version of Rajendra before the Court seems to be more probable. Non-conflict between the deposition of Rajendra and complainant gives additional strength to the credibility of the injured witness. We have discussed the nature of injuries found on the body of the deceased and undisputed fact that injured witness had left the house of the accused immediately after receipt of the blow on the head. We are not inclined to accept the submission of Mr. Shah that there is material conflict between oral evidence of the complainant and the medical evidence available on record. Report of forensic science laboratory, exh. 38 is rightly considered by the learned trial Judge. Presence of both the accused in their house was natural and the injured witness was never asked question even indirectly during his cross-examination that the injured witness Narsinh and deceased Pravin were assailants and had gone to the house of the accused persons with a view to use force for taking away Lala

from the custody of accused no. 1, a natural guardian. Some exaggeration made by Pravinsinh Keshubha with a view to involve accused no. 1 is ignorable and, therefore, is rightly ignored.

16. One of the arguments of Mr. Shah is that these three prosecution witnesses have tried to implicate female members of the family in a serious crime of murder, atleast one of them might be taking care of minor Lala. Their act of leaving the house cannot be said to be an improbable conduct and when the witnesses have tried to falsely implicate these two female persons as accused, why their version should be accepted qua other two i.e. accused nos. 1 and 2. This is a case wherein there is possibility of separating the grain from chaf and by applying theory of elemination in light of other evidence available on record. We can separate the case of accused nos. 3 and 4 accepting the submissions of the Ld. counsel appearing for the appellants. We agree that the learned trial Judge has not given any cogent reasons for holding the accused nos. 3 and 4 guilty by pointing out any overt act or omission under which their participation or sharing of common intention could have been said to be brought on record by prosecution. Mere presence at the place of incident would not make a person accused. Their presence in their house may be natural. They might have left their house as the male members were leaving the house. Use of back door for leaving the house may be inconsistent with the innocence of accused nos. 1 and 2, but the same cannot be treated as inconsistently qua accused nos. 3 and 4. They might have accompanied the accused nos. 1 and 2, on command. There is also reference in the evidence of prosecution that accused nos. 3 and 4 had left the house after locking it. According to us, it is not relevant as to from which door or gate accused nos. 3 and 4 had left the house because they may follow the male members of family. Such reference is indirectly there on record in the deposition of Narsinh Kachraji. The conviction of accused nos. 3 and 4 u/S. 302 read with sec. 34 of the IPC is bad on facts and law.

17. In view of the aforesaid evidence available on record and in the light of above set of facts, we agree with the submission of Mr. A.D. Shah that accused nos. 3 and 4 are wrongly convicted for the offence punishable u/S. 326 read with section 34 of the IPC and hence their conviction shall have to be turned down. The element of common intention must be satisfactorily established beyond reasonable doubt and in absence of such evidence the trial Court ought to have acquitted these accused

i.e. accused nos. 3 and 4.

18. In view of role played by accused nos. 1 and 2, their conviction u/S. 34 of the IPC is found legal. However, the question is whether the offence committed by the accused can be said to be of a murder within the meaning of section 300 of the I.P.C. or that they have committed any offence lesser than the offence punishable u/S. 302. Of course, Ld. APP Mr. Shah has submitted that considering the nature and number of injuries, the intention can be gathered. But, according to us, following facts and circumstances take us to some other conclusion :-

I. The exact starting of scuffle or any hot exchanges of words which might have provoked the accused nos. 1 and 2 are not brought on record by the prosecution.

II. Unarmed persons can provoke the persons who are armed with deadly weapons.

III. Visit of Pravin Arjan and Narsinh Kachraji at the house of accused persons was not with prior intimation. On the contrary it was a surprise to the family members of the accused.

IV. There was no scope for a pre-plan to commit murder. The accused no. 1 being a natural guardian of the minor son who was with him and when one child was already there with the wife of accused no.1, his reaction to continue with the custody of minor son might have given a cause of excitement.

The stand taken by the learned counsel for the appellants Mr. Shah while advancing alternative arguments and the totality of the facts of the case on record of this case takes us to the conclusion that the trial Court ought not to have held accused nos. 1 and 2 guilty of the offence punishable u/S. 302 of the IPC.

We would like to quote the relevant part of the judgment reported in the case of Surinder Kumar (supra) as under:

"Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation: It is immaterial in such cases which party offers the provocation or commits the first assault."

6. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not acted cruelly. In the present case, the deceased and PW 2 had entered the room occupied by Sikander Lal and his family members and had demanded vacant possession of the kitchen. When they found that the appellant was disinclined to handover possession of the kitchen, PW 2 quarrelled and uttered filthy abuses in the presence of the appellant's sister. On the appellant asking him to desist he threatened to lock up the kitchen by removing the utensils, etc., and that led to a heated argument between the appellant on the one side and PW 2 and his deceased brother on the other. In the course of this heated argument it is the appellant's case that PW 2 took out a knife from his pant pocket. This part of the appeIIant's case seems to be probable having regard to the antecedents of PW 2. It is on record that PW 2 was convicted at Narnaul on two occasions under Section 411, IPC and his name was registered as a bad character at the local police station. It was presumably because of this reason that he had shifted from Narnaul to Chandigarh a couple of years back and had started to live in the premises rented by PW 4. When the appellant found that PW 2 had taken out a pen knife from his pocket he went into the adjoining kitchen and returned with a knife. From the simple injury caused to PW 2 it would

appear that PW 2 was not an easy target. That is why the learned Sessions Judge rejected the case that Amrit Lal had held PW 2 to facilitate an attack on him by the appellant. It further seems that thereafter a scuffle must have ensued on Nitya Nand intervening to help his brother PW 2 in which two minor injuries were suffered by the deceased on the left arm before the fatal blow was inflicted on the left flank at the level of the 5th rib about 2" below the nipple- It may incidentally be mentioned that the Trial Court came to the conclusion that the injury found on the neck of PW 2 was a selfinflicted wound and had therefore acquitted the appellant of the charge under Section 307, IPC, against which no appeal was carried. We have, however, proceeded to examine this matter on the premise that PW 2 sustained the injury in the course of the incident. From the above facts, it clearly emerges that after PW 2 and his deceased brother entered the room of the appellant and uttered filthy abuses in the presence of the latter's sister, tempers ran high and on PW 2 taking out a pen knife the appellant picked up the knife from the kitchen, ran towards PW 2 and inflicted a simple injury on his neck. It would be reasonable to infer that the deceased must have intervened on the side of his brother PW 2 and in the course of the scuffle he received injuries, one of which proved fatal. Taking an overall view of the incident we are inclined to think that the appellant was entitled to the benefit of the exception relied upon. The High Court refused to grant him that benefit on the ground that he had acted in a cruel manner but we do not think that merely because three injuries were caused to the deceased it could be said that he had acted in a cruel and unusual manner. Under these circumstances, we think it proper to convict the accused under Section 304, Part I, IPC and direct him to suffer rigorous imprisonment for 7 years."

According to us the offence committed by the accused nos. 1 and 2 can be said to be an offence punishable u/S. 304 Part-I of the IPC and not that of murder. Hence the alternative argument to acquit the accused for the offence punishable u/S. 302 read with sec. 34 of the IPC and altering conviction u/S. 304

Part-I read with sec. 34 of the IPC is accepted.

20. The accused no. 1 is held guilty by the trial Court for the offence punishable u/S. 307 of the IPC. However, injured witness Narsinh Kachra has been examined and he deposed that though he was injured with deadly weapon like sword, he had gone to the hospital and competently he has described the incident. Opinion of the doctor qua the nature of injury sustained by this witness does not say that the injury was grave in nature or serious. Of-course, the part of the body on which the blow was inflicted was vital. But only on that count the accused no. 1 cannot be fastened with the liability u/S. 307, because it is the duty of the prosecution to prove that, in the event of death of an injured, the accused would have been convicted u/S. 302 of the IPC.

21. In view of the above discussion, we do not hold the accused persons guilty for the ofence punishable u/S. 302 qua the deceased Pravin Arjan as the element of intention to kill being missing. The blow given to Narsinh Kachraji was sudden and as he had tried to intervene, a blow was given. It cannot be said that the same was inflicted with a view to kill him. So the basic element of the offence is not available in evidence. Hence the conviction u/S. 307 of the IPC shall have to be set aside by altering it into a conviction u/S. 324 of the IPC. It would be proper to convict these accused u/S. 324 of the IPC because of the nature of injury and the fact that only one blow was given. The sentence imposed on accused nos. 2, 3 and 4 u/S. 326 read with sec. 34 of the IPC is not in accordance with the evidence available on record. The reasons assigned by the learned trial Judge for holding the accused Nno. 3 and 4 guilty for the offence punishable u/S. 326 read with sec. 34 of the IPC in para. 30 of the judgment, are contrary to law and against the basic case pleaded by the prosecution. The accused nos. 3 and 4 are acquitted in the main offence for the same reason. They cannot be linked with accused no. 1 and 2 for the main offence read with sec. 34 and it would not be otherwise legal or proper to hold that accused no. 2 had shared the intention with accused no. 1 in causing injury to injured witness Narsinh Kachraji. It is an individual wrong committed by the accused no. 1 against one individual namely, Narsinh Kachraji. This Court is informed that the accused no. 2 - Devji Rasang Solanki has died. Hence the appeal qua accused no. 2 stands abated. Thus, in view of the aforesaid facts and circumstances of the case and in the light of the above discussion, we are inclined to accept the basic

submissions advanced by the Ld. APP and the legal alternative submissions advanced by the Ld. counsel for the appellants.

22. In the result, the appeal is partly allowed. The conviction and sentence of accused nos. 3 and 4 are quashed and set aside and they are acquitted from all the charges levelled against them. Their bail and personal bonds shall stand discharged. The fine, if paid by both these accused shall be refunded to them.

The conviction and sentence of accused nos. 1 and 2 u/S. 302 read with sec. 34 of the IPC is quashed and set aside. However, they are held guilty for the offence punishable u/S. 304 Part-I read with sec. 34 of the IPC. The formal finding qua the accused no. 2 is not recorded for undergoing imprisonment as he has died pending the appeal and, hence, the appeal against accused no. 2 (appellant no. 2 - Devji Rasang Solanki) stands abated. The conviction and sentence against accused no. 1 is altered from u/S. 302 to u/S. 304 Part-I of the IPC and the accused no. 1 is directed to undergo imprisonment for 10 years. This Court is told that he has already undergone imprisonment for more than 10 years.

The conviction of accused no. 1 u/S. 307 is set aside by altering it into conviction u/S. 324 of the IPC. But no separate sentence is imposed on the accused no.1 for the offence punishable u/S. 324 of the IPC. At present he is on bail. Hence it is clarified that if he has undergone the sentence for 10 years or more including the period spent as an undertrial and the other benefits including State pardon, (remission) he shall not be obliged to surrender and his bail and personal bonds shall stand discharged.

Ld. A.P.P. has shown a report signed by the Dy. Superintendent of Central Jail, Ahmedabad, wherein it is made clear that on the date of report i.e. 28/2/2000 the appellant no. 1 (original accused no.1) has already undergone imprisonment for more than 10 years and 3 months excluding the State pardon-remission.

The sentence of fine is confirmed. It is clarified that if the accused no. 1 has not paid the amount of fine of Rs.500/- imposed by the Sessions Court, warrant of arrest to undergo one month's simple imprisonment shall be issued.

[C.K. BUCH, J.]

[H.H. MEHTA, J.]

* Pansala.